Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

OCTOBER TERM, 1995

KAYNO M. REED, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Once a criminal defendant shows that he has been prejudiced by inordinate prosecutorial preindictment delay, must he also bear the burden of proving that the delay was egregious or intentional to establish a violation of the Due Process Clause of the Fifth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Kayno M. Reed, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Armed Forces rendered in this proceeding on March 22, 1995.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Reed*, 41 M.J. 449 (1995), is reprinted as Appendix A.

The unpublished opinion of the United States Navy-Marine Corps Court of Military Review, *United States v. Reed*, No. 94-0213 (N.M.C.M.R. April 19, 1994), is reprinted as Appendix B.

The general court-martial ruling on the defense motion to dismiss, *United States v. Reed*, (Order, Tielens, J. January 27, 1994), is reprinted as Appendix C.

JURISDICTION

The United States Court of Appeals for the Armed Forces affirmed the decision of the United States Navy-Marine Corps Court of Military Review on March 22, 1995. 28 U.S.C. § 1259(3) provides jurisdiction in this case and entitles petitioner to seek review of the United States Court of Appeals for the Armed Forces' decision.

STATEMENT OF THE CASE

Petitioner allegedly raped another Sailor (Seaman X) twice at a party in November 1991. Her first mention of the alleged rape was in a conversation with her husband in January 1992. Thereafter, her husband reported the alleged rape to a Navy chaplain, who, in turn, reported it to Seaman X's commanding officer. Seaman X was sent to the Naval Criminal Investigative Service [hereinafter NCIS] to make a report. NCIS began an investigation in March 1992. In April 1992, Seaman X recognized the name "Kayno Reed" and others as possible suspects. Petitioner's command learned of the investigation in August 1992, when NCIS sent a copy of the victim's statement and a request for a photograph and fingerprints to his ship. NCIS completed its initial investigation in December 1992. Petitioner's command requested a follow-up investigation in January 1993. In September 1993,

Petitioner's command placed him on legal hold.[1] A single charge and two specifications alleging rape were preferred on September 24, 1993 and Petitioner was informed of the charge on September 27, 1993.[2] An Article 32 hearing was conducted on October 8, 1993.[3] The investigating officer completed the investigation on October 21, 1993 and recommended trial by general court-martial. The charge was forwarded to the General Court-Martial convening authority on November 23, 1993. The charge and two supporting specifications were referred to trial on January 10, 1994, roughly 26 months after the alleged rape.

At his court-martial, Petitioner moved to dismiss the charge and specifications raising, *inter alia*, that he was denied his Fifth Amendment right to due process. Specifically, the motion addressed the due process guarantee of the Fifth Amendment as applied to pre-preferral delays in prosecuting Petitioner.

The military judge dismissed the charge and specifications on January 27, 1994. He specifically found

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[1] "Legal hold" is an administrative status used by the Armed Forces to retain personal jurisdiction of a service member accused of a crime who is past the expiration of his enlistment contract. See *United States v. Solorio* 483 U.S. 435 (1987)(discussion of courts-martial jurisdiction in general.) Petitioner has been continuously on legal hold since September 4, 1993.

[2] "Preferral" is the military's method for the swearing of charges and is the functional equivalent of an information or an indictment. *See*, Article 30, Uniform Code of Military Justice; 10 United States Code § 830; *see also,* Analysis, Rule for Courts-Martial 307.

[3] Article 32, Uniform Code of Military Justice (UCMJ) is the military equivalent of a preliminary hearing. 10 United States Code § 832.

that Petitioner had suffered prejudice as a result of the delay, in that witnesses' memories had faded and they were difficult to find. He also found that the delay by the government was without justification. The military judge concluded that Petitioner "has been denied the due process guaranteed him under the Fifth Amendment to the U.S. Constitution." *Reed*, (Order); App. C.[4]

The Respondent filed a notice of appeal with the military judge on January 28, 1994, pursuant to Article 62, UCMJ; 10 U.S.C. § 862. The record was filed with the United States Navy-Marine Corps Court of Military Review on February 16, 1994. The Navy-Marine Corps Court of Military Review issued its unpublished opinion on April 19, 1994, reversing the military judge. The Court of Military Review found as follows:

> A. The finding that the accused suffered actual prejudice by the delay between notice of the alleged crime and the preferral of charges is not supported by the evidence.
> B. The evidence does not support the finding that the delay from notice of offense until preferral of charges was without justification.
> C. The military judge did not properly follow the law in *[United States v.] Lovasco*, [431 U.S. 783 (1977)].

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[4] The harm to Petitioner has been substantial. He is trained as an Operations Specialist who would normally operate sophisticated radar, navigation, and communications equipment in a ship's combat-information center or on the bridge, but has not been able to work in this field due to the charges pending against him. Instead, his duties consist primarily of picking up garbage and mowing lawns.

United States v. Reed, No. 94-0213 (N.M.C.M.R. April 19, 1994); App. B.

The Court of Military Appeals[5] granted the petition for review on September 1, 1994 and the Court of Appeals for the Armed Forces decided the case on March 22, 1995, affirming the Navy-Marine Corps Court of Military Review's decision. *United States v. Reed*, 41 M.J. 449 (1995); App. A. The majority held that "there was no violation of [petitioner's] right to speedy trial under the Fifth Amendment's Due Process Clause." *Reed*, 41 M.J. at 450. The court agreed with the Navy-Marine Corps Court of Military Review that the military judge misapplied *Lovasco*, relying on *United States v. Marion*, 404 U.S. 307 (1971), because "prejudice is only one prong of a due process claim"; [t]here must be an examination of the reason for the delay." *Reed*, 41 M.J. at 452. With that established, the majority's opinion discussed the burden of proof in such cases. The majority opinion adopted what it referred to as what "[m]ost of the federal courts . . . have held;" that the "defendant has the burden of proof to show an egregious or intentional tactical delay and actual prejudice." *Reed*, 41 M.J. at 452. The court, after analysis, specifically found that Petitioner "has not met his burden of proof to show a violation of both prongs of the due process test." *Reed*, 41 M.J. at 453.

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[5] The United States Court of Military Appeals recently changed its name to the United States Court of Appeals for the Armed Forces. *See* 40 M.J. LXI (1994).

REASON FOR GRANTING THE WRIT

A SPLIT AMONG VARIOUS STATE AND FEDERAL COURTS EXISTS OVER WHETHER AN ACCUSED, WHO COMPLAINS THAT HE HAS BEEN DENIED DUE PROCESS AS A RESULT OF PRE-ACCUSATION DELAY, CARRIES THE BURDEN TO PROVE, IN ADDITION TO ACTUAL PREJUDICE, THAT THE GOVERNMENT HAS ENGAGED IN EGREGIOUS OR INTENTIONAL TACTICAL DELAY.

Two conflicting standards are currently employed among state and federal courts to determine what burden of proof an accused must bear in demonstrating harm as a result of pre-indictment delay. *Compare United States v. Byrd*, 31 F.3d 1329 (5th Cir. 1994) *with Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990). The Court should resolve this conflict in order to ensure consistency among the lower courts in their approach to the issue.[6]

Most federal courts have adopted a conjunctive, two-pronged test requiring the defendant to prove both substantial prejudice and intentional delay by the government to gain tactical advantage. *See e.g., United States v. Byrd*, 31 F.3d 1329, (5th Cir. 1994); *United States v. Acevedo*, 842 F.2d 502 (1st Cir. 1988); *Perez v. Sullivan*, 793 F.2d 249, 259 (10th Cir. 1986), *cert. denied*,

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[6] This Court, in *dicta*, has noted that a defendant has the burden of proving both intentional tactical delay and actual prejudice. *See, United States v. Gouveia*, 467 U.S. 180 (1984). Despite this language, the conflicts among the state and federal courts continues to exist.

479 U.S. 936 (1986); Many state jurisdictions have followed this line. *See e.g., State v. Gattuso*, 825 P.2d 569 (Nev. 1992); *Gonzales v. State*, 805 P.2d 630 (N.M. 1991); *State v. Vanasse*, 593 A.2d 58 (R.I. 1991); *State v. Robinson*, 567 A.2d 1173 (Conn. 1989); *State v. Swann*, 370 S.E.2d 533 (N.C. 1988); *State v. Hight*, 274 S.E.2d 638 (Ga. 1980); *State v. Robinson*, 696 S.W.2d 826 (Miss. 1985); *State v. Smith*, 699 P.2d 711 (Utah 1985).

In stark contrast to those decisions, a second line of federal cases maintains that once the defendant establishes prejudice, the burden shifts to the government to show legitimate reasons for the delay. *See e.g., Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990), *cert. denied*, 498 U.S. 1016 (1990); *United States v. King*, 593 F.2d 269 (7th Cir. 1979); *United States v. Valentine*, 783 F.2d 1413 (6th Cir. 1986). These cases then require the court to balance the reasons asserted by the government against the prejudice shown by the defendant. *See, United States v. Weaver*, 565 F.2d 129 (8th Cir. 1977), *cert. denied*, 434 U.S. 1074 (1978). Other state courts have followed this second line of cases. *See e.g., Fritz v. State*, 811 P.2d 1353 (Okla. 1991); *State v. Varagianis*, 512 A.2d 1117 (N.H. 1986); *State v. Denny*, 350 N.W.2d 25 (N.D. 1985); *People v. Park*, 400 N.E. 2d 966 (Ill. 1980), *cert. denied*, 449 U.S. 1085 (1980); *State v. English*, 594 P.2d 1069 (Hi. 1979).

The conflict among the circuits on this issue has not gone unnoticed. In his dissent from the denial of certiorari in *United States v. Hoo*, 825 F.2d 667 (2nd Cir. 1987), *cert. denied*, 484 U.S. 1035 (1988), Justice White alluded to the significant disagreement in the lower courts over the proper test for determining if prosecutorial preindictment delay amounts to a due process violation, and commented:

> The continuing conflict among the Circuits on this important question of constitutional law requires resolution by this Court; I would grant certiorari.

Hoo v. United States, 484 U.S. 1035, 1036 (1988)(White, J., dissenting from denial of certiorari).

In utilizing the first approach, the court below failed to apply the correct standard for determining whether the preindictment delay violated Petitioner's due process rights under the Fifth Amendment of the United States Constitution.

> Taking [that] position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play.

Howell v. Barker, 904 F.2d at 895.

The appellate courts below should have followed the approach adopted by the Fourth, Sixth and Seventh Circuits and urged in the dissenting opinion of this case: "Once an accused has shown actual prejudice, the court will balance the nature of that prejudice against whatever reasons are offered by the government to explain delay." *Reed* 41 M.J. at 455. This approach allows a court to "ask itself, given the balance under the circumstances of the case before it, whether the Government's prosecution after substantial delay violates 'fundamental conceptions of

justice' or 'the community's sense of fair play and decency.' *See United States v. Lovasco*, [431 U.S. 783, 790 (1977)]." *Reed*, 41 M.J. at 455-56. "In order for the court to weigh the competing interests correctly, it is necessary for it to be fully apprised of the reasons asserted by the Government as necessitating the pre[]indictment delay. These reasons can best be put forward by the Government." *United States v. King*, 593 F.2d at 172. Had the Court of Appeals for the Armed Forces adopted the proper standard, it would have found insufficient legitimate reasons for the delay of over two years in bringing this case to trial.

CONCLUSION

Petitioner respectfully asks the Court to decide what standard courts should use for determining whether an accused has been denied due process as a result of preindictment delay. In doing so, the Court will resolve the split among the lower courts on this important question of Constitutional law and ensure that all defendants are afforded due process of law. Accordingly, the Court should issue a writ of *certiorari*.

Respectfully submitted,

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June 1995

APPENDICES

APPENDIX A

U.S. COURT OF APPEALS FOR THE ARMED FORCES

No. 94 6003

CMR No. 94 0213

UNITED STATES, Appellee,

v.

Kayno M. REED, Seaman
U.S. Navy, Appellant.

Argued October 12, 1994

Decided March 22, 1995

For Appellant: *Lieutenant Brian C. Lansing*, JAGC, USNR (argued); *Commander Philip D. Cave*, JAGC, USN (on brief); *Lieutenant Gerard Wm. Wittstadt, Jr.*, JAGC, USNR.

For Appellee: *Lieutenant Commander Lyle H. Bowen, Jr.*, JAGC, USN (argued); *Colonel J. Composto*, USMC, and *Commander Stephen A. Stallings*, JAGC, USN (on brief).

Military Judge: T.P. Tielens

Opinion of the Court

CRAWFORD, Judge:

1. The military judge granted the accused's motion to dismiss the rape charge because of denial of speedy trial under the Fifth Amendment Due Process Clause. The Government appealed this ruling under Article 62, Uniform Code of Military Justice, 10 USC § 862 (1983), to the Court of Military Review which reversed the judge's ruling. This Court then granted the petition to review the decision of the Court of Military Review on the following issue:

> WHETHER THE NAVY-MARINE CORPS COURT OF MILITARY REVIEW ERRED IN REVERSING THE MILITARY JUDGE'S RULING THAT THE GOVERNMENT FAILED TO ACCORD APPELLANT DUE PROCESS OF LAW THROUGH ITS PRE-PREFERRAL DELAY IN BRINGING THE CASE TO TRIAL.

We hold that there was no violation of appellant's right to speedy trial under the Fifth Amendment's Due Process Clause.

FACTS

2. The rape charge in this case stems from a weekend party at a civilian hotel in November 1991 attended by a group of sailors who were assigned to various ships and undergoing apprenticeship training in Orlando, Florida. Seaman X alleges she was raped twice in a hotel room after she had passed out on a bed after overindulging in alcohol. She did not immediately report

the incident but told her husband in January 1992 after watching a movie in which a girl was raped. Her husband reported this to a chaplin, who in turn reported it to the command. Unpub. op. at 1-2. X was referred to the Naval Investigative Service (NIS) in San Diego to make a report about the incident. X was not then sure of the identity of the rapist.

3. On March 13, 1992, Robin Flanders, the control agent for NIS in San Diego, requested information from Orlando pertaining to X's allegations. On March 31, 1992, Agent Flanders obtained rosters from the various ships and units in order to attempt to identify the suspect and witnesses. On April 27, 1992, X identified the name "Kayno Reed" as a suspect as well as the names of other witnesses. As a result, NIS sent requests for further inquiries to six other locations including Mayport, Florida, to obtain appellant's photograph and fingerprints. Following this inquiry, the agents had to contact two additional locations because the individuals were on ships that had moved. In May 1992, NIS learned that one of the witnesses, McElroy, was deployed to the Western Pacific and would not return to Honolulu until July 1992. NIS agents also learned that appellant had deployed from Mayport with his ship.

4. Appellant's command first learned of the investigation when they docked in Malta in August 1992. Appellant's command received a copy of the victim's statement and a request from NIS for additional information, including photographs for a lineup. The ship left Malta, and its officers did not hear about the rape again until around December 1992 when they returned to the Caribbean. NIS completed its initial investigation on December 8, 1992, and sent a copy to appellant's

command.

5. On January 13, 1993, appellant's commander requested a followup investigation. The followup involved reinterviewing McElroy who may have been one of the witnesses in the hotel room on the evening of the rape. McElroy was contacted on May 6, 1993, by telephone but was unable to provide additional information. On September 4, 1993, appellant was notified that his term of enlistment was being extended because of the investigation. He was not allowed to take any examinations for promotion after that date and was also placed on medical hold because of an injury to his knee.

6. On September 24, 1993, the charges and specifications were preferred against the accused, and he was informed of these on September 27, 1993. The charges were received by the summary court-martial convening authority on October 5, 1993; and on October 8, 1993, an investigation under Article 32, UCMJ, 10 USC § 832, was conducted. The Article 32 investigation was completed on October 21, 1993, and the investigating officer recommended trial by general court-martial. Appellant's command forwarded the charges to the general court-martial convening authority on November 23, 1993, recommending a general court-martial. The charges were referred to trial on January 10, 1994.

DISCUSSION

7. No discussion of the issue in this case can begin without setting forth (A) the sources of speedy-trial rights in the military; (B) the due process two-prong test; and (C) the burden of proof.

A. Sources of Right to Speedy Trial

8. There are a number of sources of the right to a speedy trial in the military: (1) statute of limitations; (2) Due Process Clause of the Fifth Amendment; (3) Sixth Amendment speedy-trial guarantee; (4) Articles 10 and 33 of the Code, 10 USC §§ 810 and 833, respectively; (5) RCM 707, Manual for Courts-Martial, United States, 1984 (Change 5); and (6) case law.

9. The accused alleges a denial of speedy trial under the Due Process Clause of the Fifth Amendment because the Sixth Amendment speedy-trial protection does not apply to pre-accusation delays when there has been no restraint. *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Vogan*, 32 MJ 32 (CMA 1992). Likewise, Article 10, Article 33, and RCM 707 are triggered either by pretrial restraint or preferral of charges. There is protection against erroneous restraint. When there is an arrest and detention, the Government must establish probable cause to believe that the suspect has committed an offense and the detention "is required by the circumstances." RCM 304(c). *See United States v. Rexroat*, 38 MJ 292 (CMA 1993).

10. Absent restraint, the "primary guarantee," *United States v. Marion*, 404 U.S. at 322 ¶15, or "primary protection," *Perez v. Sullivan*, 793 F.2d 249, 259 ¶27 (10th Cir. 1986), against pre-accusation delay is the statute of limitations. As the Supreme Court noted in *Toussie v. United States*, 397 U.S. 112, 114-15 ¶4 (1970):

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the

> occurrence of those acts the legislature had to decide to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. . . .

While the military statute of limitations, Article 43, UCMJ, 10 USC § 843, provides protection against pre-accusation delay, it may not be sufficient by itself--thus appellant's reliance upon the Due Process Clause of the Fifth Amendment.

B. Due Process Standard

11. As we explained in *Vogan*: "[T]he Fifth Amendment Due Process Clause may be applicable to protect an accused against egregious trial delays." 35 MJ at 34 ¶8. There may be a due process violation when "incurred in reckless disregard of circumstances, known to the prosecution, suggesting that there existed an appreciable risk that delay would impair the ability to mount an effective defense." *United States v. Lovasco*, 431 U.S. 783, 795 n.17 (1977); *cf. United States v. Kossman*, 38 MJ 258 (CMA 1993).

12. We agree with the Court of Military Review that the military judge misapplied *Lovasco*. There the Court held there was no violation of due process, 431 U.S.

at 796 ¶17, even though the defense claimed the death of two material witnesses had occurred during the delay. *Id.* at 785 ¶4. The Court conceded that pre-accusation delay could result in a violation of due process. *Id.* at 789 ¶9. The Court in *Lovasco* cited *United States v. Marion*, 404 U.S. 307 (1971), for the proposition that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as prejudice to the accused." 431 U.S. at 790 ¶10. Thus, prejudice is only one prong of the due process claim. There must be an examination of the reason for delay. However, the prosecution is not required "to file charges as soon as probable cause exists." 431 U.S. at 791 ¶12.

C. Burden of Proof

13. Most of the federal courts, relying on *Lovasco* and *Marion*, have held that the defendant has the burden of proof to show an egregious or intentional tactical delay and actual prejudice.[1]

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[1] *United States v. Byrd*, 31 F.3d 1329, 1339 ¶23 (5th Cir. 1994) ("a defendant must demonstrate that the prosecutor intentionally delayed the indictment to gain a tactical advantage *and* that the defendant incurred actual prejudice"); *Perez v. Sullivan*, 793 F.2d 249, 259 ¶27 (10th Cir. 1986) ("the delay was purposefully caused by the government to gain a tactical advantage or to harass"); *United States v. Amuny*, 767 F.2d 1113, 1119 ¶18 (5th Cir. 1985) (the defendant must "establish that (1) the prosecutor intentionally delayed indicting him to gain a tactical advantage *and* (2) the defendant incurred actual prejudice as a result of the delay"); *United States v. Swacker*, 628 F.2d 1250, 1254 ¶18 (9th Cir. 1980); *United States v. Comosona*, 614 F.2d 695, 696 ¶3 (10th Cir. 1980). *Cf. Howell v. Barker*, 904 F.2d 889 (4th Cir. 1990) (apparently applying a different standard over-vigorous dissent - court found violation because of assumed prejudice and delay was for "convenience").

14. Speculation by the defendant is not sufficient. *See, e.g., United States v. Wallace*, 848 F.2d 1464 (9th Cir. 1988); *United States v. Birney*, 686 F.2d 102, 105 ¶12 (2d Cir. 1982). The defense may establish prejudice by showing: (1) the actual loss of witness, as well as "the substance of their testimony and the efforts made to locate them," *United States v. Tousant*, 619 F.2d 810, 814 ¶19 (9th cir. 1980); or (2) the loss of physical evidence, *see, e.g., United States v. Dennis*, 625 F.2d 782, 794 ¶18 (8th Cir. 1980); *United States v. Tousant*, 619 F.2d at 814 ¶19; *United States v. Comosona*, 614 F.2d 695, 697 ¶7 (10th Cir. 1980) ("[C]onclusory allegations of prejudice, otherwise unsupported in the record, do not constitute valid grounds for dismissal").

15. While this case was not a model of celerity, appellant has not met his burden of showing egregious or intentional tactical delay and actual prejudice. Here, the difficulties were in coordinating the location of witnesses throughout the world. Even when the first investigative report was completed, appellant's command found it to be a skeletal and requested additional information. Until September 1993, while the investigation was ongoing, appellant was not under charges or any sort of restraint. Additionally, the prejudice to appellant was minimal and did not involve lost witnesses or physical evidence.[2] He

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[2] In its opinion the court below observed:

> [T]he military judge stated that the mere length of delay created an inference that memories will fade.... Conspicuously absent from the record is any indication from the defense affirmatively asserting either (a) that the accused does not know the identity of this man [the person who went to the hotel room with appellant on the night in question] with whom he spent some time, or (b) that the man will provide information helpful to

was placed on legal hold 23 days before being informed of the charges and was, as in standard, not permitted to take examinations for further promotions until the charges were resolved.

16. Appellant has not met his burden of proof to show a violation of both prongs of the due process test. Thus, we hold there was no violation of due process.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Judges COX and GIERKE concur.

SULLIVAN, Chief Judge (dissenting):

17. The precise question before this Court is whether the Court of Military Review erred in reversing the military judge's ruling dismissing the charges for pretrial delay in violation of the Fifth Amendment. *See United States v. Vogan*, 35 MJ 32, 34 ¶ 8 (CMA 1992). The Court of Military Review was required to use an abuse-of-discretion standard (*see United States v. Fuzer*, 18 F.3d 517, 519 ¶ 9 (7th Cir. 1994)). It found such an abuse because the judge based his dismissal action on a record

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> the accused's defense. This failure to present some evidence or proffer regarding the knowledge of the accused concerning the identity of this man, coupled with the failure to present anything to indicate how this information would contribute to the defense of the accused, calls into question the sincerity of the accused's claims and the validity of the military judge's findings....

Unpub. op. at 10.

which showed no legally cognizable prejudice to appellant and no unreasonable government conduct. *See United States v. Windom*, 19 F.3d 1190, 1195 ¶ 15 (7th Cir. 1994); *see also United States v. Byrd*, 31 F.3d 1329, 1339-40 ¶ 23 (5th Cir. 1994).

18. The majority opinion agrees and states that "appellant has not met his burden of showing egregious or intentional tactical delay and actual prejudice." ___ MJ at 9 ¶ 15. I disagree and have attached the military judge's findings of fact in this case. *See* Appendix. I conclude that they do provide some evidence of legally cognizable prejudice and "egregious or intentional" government conduct. Accordingly, I would reverse the Court of Military Review's decision and uphold the judge's discretionary decision in this regard.

APPENDIX

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHEAST JUDICIAL CIRCUIT (PENSACOLA)
UNITED STATES NAVY

UNITED STATES

V.

KAYNO M. REED
420-17-3028
SN, USNR

GENERAL COURT-MARTIAL
RULING ON DEFENSE
MOTION TO DISMISS

OPINION OF THE COURT: Although the Defense has raised several issues of merit in its Motion to Dismiss, for reasons to become apparent, this opinion will address only the allegation that the accused was denied his Fifth Amendment right to Due Process. The Due Process guarantee of the Fifth Amendment applies to pre-preferral delays in prosecuting the accused. Once preferral has occurred, other speedy trial guarantees apply.

The leading case on the Fifth Amendment Due Process Clause is *United States v. Lovasco*, 431 U.S. 783 (1977). In this case the Supreme Court held that for a delay to be in violation of the Fifth Amendment Due Process Clause it must violate those "fundamental conceptions of justice which lie at the base of our civil and political institutions" and which define the "community sense of fair play and decency" *Lovasco* at 790. Military cases on this issue include *United States v. Vogan*, 35 MJ 32 (CMA 1992), *United States v. Reeves*, 34 MJ 1261 (NMCMR 1992). These cases require a court to evaluate a claimed violation of the Fifth Amendment Due Process Clause by looking to any actual prejudice to the accused and considering the reasons for delay.

Actual prejudice to the accused in this case includes the following:

An approximate 20 month delay occurred from the time of notice of the crime until preferral of charges. A delay of this magnitude clearly creates the inference that memories will have faded. This inference is easily supported by the NCIS investigation which reported that because of the delay a witness to the incident was unable to recall and identify others who were present when this event allegedly occurred. This delay will further have, at a minimum, denied the defense the opportunity to question the witnesses, as did the Government, at a time when their memory would be fresh. Rather, as the Government indicated in their Response to this motion, the witnesses will now likely refresh their recollection with the statements taken by the Government through NCIS.

The Defense specifically alleges the delay resulted in an inability to identify and locate certain witnesses generally identified as "two black males" in the room the night of this alleged incident. This contention is supported by the NCIS investigation which discusses a similar inability.

The accused has been held over his EAOS which would have been 4 September 1993. He was not free to return to civilian life at the expiration of his two year active duty enlistment. This prejudice is one not easily measured under a civilian "community sense of fair play and decency," as required by *Lovasco*. In a civilian community the accused is not restrained by the investigating jurisdiction unless he is in some fashion confined or his freedom of movement restricted--a stage at which other speedy trial rules would apply. In the military

community a simple administrative action ensures retention of jurisdiction and the concomitant restriction of his freedom to re-enter the civilian community.

There is further a strong prejudice which attaches to an accused in the military, as this accused, whose command knows he is a "suspect" and then becomes the convening authority responsible for criminal processing of the alleged offense. In this regard, the military environment is unique and different than the civilian community and requires an application of a "community sense of fair play and decency" which may be different than which applies in a civilian community. In the case at bar, we are concerned with a military community where, to analogize to the civilian community, the accused's "employer-boss" is in effect the "district attorney" who is determining whether to proceed with charges. This is markedly different than in the civilian community where an individual may be a suspect but, other than the investigators and possibly the district attorney, his personal/professional life will be by-and-large unaffected by these potential charges. For this accused, he was required to rely on his commanding officer, the "district attorney", for performance evaluations, recommendations for advancement, opportunities for school and training and other areas where he would have to compete with shipmates for consideration. The prejudice to someone in this predicament is subtle but obvious. It appears the accused's commanding officer clearly became aware the accused was a suspect in August 1992 when a NCIS agent came aboard the ship in Malta to photograph the accused for line-up. For over 11 months prior to preferral, the accused's commanding officer was not only aware that he was a suspect but actually had a complete copy of the investigation and was responding to the alleged victim's

command concerning action he was taking. At one point in December 1992, he even ordered further investigation by NCIS.

The Government's justification for the delay includes the following:

A lengthy chronology of investigative efforts to locate witnesses and interview them around the world. Since this incident allegedly occurred at "A" school but was not reported until after the school had been completed, the students had been sent to their next assignment and it was no easy task to locate them. This process, however, became ever more bogged-down as the investigative delays themselves caused further difficulties in locating suspects. It appears, as an example, that NCIS waited ten months to interrogate the accused. To illustrate further delay, at one point after the investigation had been closed, it was re-opened at the request of the commanding officer. It took NCIS over seven months of investigation for the limited purpose of obtaining additional information which was essentially that the witness could not remember anything further. In an effort to both explain the delay and minimize its prejudice, the Government is forced to take inconsistent positions. They argue, on one hand, that the investigation required significant time because of the many witnesses and difficulty in perfecting their case, yet they argue that the accused is not prejudiced by this delay since the case is relatively straight-forward and the only significant witness is the victim. The Government cannot have it both ways.

In summary, it is not the purpose of this Court to point a finger or lay blame at Government officials for delays in this case. The court is aware that there are

investigative techniques to employ; resources are at times strained; and, the Government is entitled to perfect its case prior to preferral of charges. Additionally, commanding officers have ships to command and deployments to make. The inescapable conclusion in this case, however, is that the delay from notice of offense until preferral of charges was without justification and occurred to the great prejudice of the accused. This case concerns an incident which was quickly narrowed to one suspect, one victim and a handful of witnesses. There was no physical evidence to examine, no records to search and no lab or forensic tests to conduct. Indeed, the Government indicates at trial they intend to call only the alleged victim and two witnesses. The Government took approximately 20 months to investigate this incident and is now ready to prosecute using three witnesses. Nothing in the Government's argument serves as an adequate explanation of this delay. This delay was not without prejudice to the accused as he served over two-thirds of his enlistment as a rape "suspect" and known to be such by his commanding officer. The accused is further prejudiced by his involuntary extension beyond his enlistment and the many complications created by an effort to prepare a defense several years after the alleged incident.

Furthermore, while the statute of limitations may provide the outermost time at which an accused may be brought to trial, as the Government correctly argues, it clearly does not establish an entitlement for delay. Each case must be evaluated on its own merits, both the reasons for delay and the prejudices suffered by the accused. A relatively uncomplicated offense should not require an accused to suffer the prejudices as discussed above including those attendant to being labeled a "suspect" in a rape for over a year while at the same time the

Government's action is highlighted by month after month of complete inactivity. This Court finds that the accused has been denied the due process guaranteed him under the Fifth Amendment to the U.S. Constitution.

IT IS HEREBY ORDERED, Defense Motion to Dismiss is granted and the charge and specifications are dismissed with prejudice.

T.P. Tielens
Military Judge

WISS, Judge (dissenting):

19. In my view, this appeal presents two principal questions. The first concerns the proper legal test to be applied to a claim that an accused was denied due process as a result of a pre-preferral delay. I do not agree with the majority's answer to that question. Further, if one assumes for this discussion that the majority is correct in it answer, then the military judge applied an incorrect test, and the appropriate remedy is a remand so that the military judge may apply the correct one to the facts of the case--not for the majority to do so *ab initio*.

20. The second concerns the scope of claimed prejudice to the accused that may be considered in resolving such a claim. I do agree with the majority's implicit answer to this question. The military judge exceeded that scope, however, so I believe that, again, the appropriate remedy is a remand to the military judge for consideration of the accused's contention under proper construction of the law--not for this Court to perform this task in the first instance. Accordingly, I dissent.

21. Before a court will entertain an accused's claim that he was denied due process because of pre-preferral delay, the accused must demonstrate that he suffered actual prejudice as a result. *See* Part II, *infra*. In the face of such a showing, what is the appropriate legal test to be applied in connection with the Government's reasons for the delay? In other words, regarding the causes of the delay, who has the burden to show what?

22. The majority states that "[m]ost of the federal courts, relying on [*United States v.] Lovasco*[, 431 U.S. 783 (1977),] and [*United States v.] Marion*[, 404 U.S. 307

(1971)], have held that the defendant has the burden of proof to show an egregious or intentional tactical delay and actual prejudice." ___ MJ at (8) ¶ 13. In support, the majority drops a footnote that cites cases from the Fifth, Ninth, and Tenth Circuits. In fact, the circuits are split on this issue, with some circuits expressly rejecting that view of the teachings of *Marion* and *Lovasco*.

23. For instance, in *Howell v. Barker*, 904 F.2d 889, 895 ¶¶ 20-22 (4th Cir. 1990), the majority discussed and resolved this question as follows:

> Therefore, in both *Lovasco* and *Marion*, the Supreme Court made it clear that the administration of justice, vis-a-vis a defendant's right to a fair trial, necessitated a case-by-case inquiry based on the circumstances of each case. Rather than establishing a black-letter test for determining unconstitutional preindictment delay, the Court examined the facts in conjunction with the basic due process inquiry: "whether the action complained of . . . violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which define 'the community's sense of fair play and decency.'" *Lovasco*, 431 U.S. at 790, 97 S.Ct. at 2048 (citations omitted); *see United States v. Automated Medical Laboratories*, 770 F.2d 399, 404 (4th Cir. 1985).
>
> Applying these principles of due process to the case at hand, we cannot agree

with the position taken by the State of North Carolina and those other circuits which have held that a defendant, in addition to establishing prejudice, must also prove improper prosecutorial motive before securing a due process violation. Taking this position to its logical conclusion would mean that no matter how egregious the prejudice to a defendant, and no matter how long the preindictment delay, if a defendant cannot prove improper prosecutorial motive, then no due process violation has occurred. This conclusion, on its face, would violate fundamental conceptions of justice, as well as the community's sense of fair play. Moreover, this conclusion does not contemplate the difficulty defendants either have encountered or will encounter in attempting to prove improper prosecutorial motive.

The better position, and the one previously taken by this Circuit in *United States v. Automated Medical Laboratories, supra*, is to put the burden on the defendant to prove actual prejudice. Assuming the defendant can establish actual prejudice, then the court must balance the defendant's prejudice against the government's justification for delay. *Automated Medical Laboratories*, 770 F.2d at 403-04. "The basic inquiry then becomes whether the government's action in prosecuting after substantial delay violates 'fundamental conceptions of justice' or 'the community's

sense of fair play and decency.' *Id.* at 404 (citations omitted).

24. Over a decade earlier, the Seventh Circuit had expressed similar reasoning in reaching the same conclusion in *United States v. King*, 593 F.2d 269, 172-72 ¶¶ 9-11 (1979) (citation and footnote omitted):

> If, on remand, it is determined that the defendants have suffered actual prejudice as a result of the pre-indictment delay, the reasons for the delay will have to be considered by the district court. *Lovasco, supra*, 431 U.S. at 790, 97 S.Ct. 2044. Although the Supreme Court in *Marion* indicated that a "delicate judgment" would be required "[t]o accommodate the sound administration of justice to the rights of the defendant to a fair trial," it left that judgment to the circumstances of each case. *Id.* . . .
>
> Two of the questions left unanswered are (1) given actual prejudice resulting from the delay, what sort of purpose or reason behind the delay must be shown to give rise to a due process violation, and (2) who bears the burden of proof on this issue. Some courts have seemed to require the defendant to prove that issuance of the indictment was purposefully delayed in an attempt by the Government to gain a tactical advantage over the defendant. *See, e.g., United States v. Francisco*, 575 F.2d 815, 817 (10th Cir. 1978). . . Others have read *Lovasco* as only

requiring the defendant to prove actual prejudice, after which showing it is up to the court to balance the reasons asserted by the Government against the prejudice asserted by the defendant. *See, e.g., United States v. Brand*, 556 F.2d 1312, 1317 n.7 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063, 98 S.Ct. 1237, 55 L.Ed.2d 763 (1978).[1] We believe

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[1] The decision of the fifth circuit in *Brand* was cited by that same circuit in its 1982 opinion in *United States v. Townley*, 665 F.2d 579, *cert. denied*, 456 U.S. 1010 (1982). There, the court wrote:

> We should, at this point, briefly note a contention advanced by the government in brief but not urged at oral argument. Based on statements to that effect by way of dicta in some of our decisions, the government initially suggested that, even if actually prejudiced, an accused could not prevail upon his due process claim unless he also proves that the delay resulted from intentional a tactical delay or harassment on the part of the government. To the contrary, an earlier decision of the circuit has noted, consistent with holdings in earlier decision of this circuit, that *Lovasco* and *Marion* do not stand for the proposition "that governmental interests *not* amounting to an intentional tactical delay will automatically justify prejudice to a defendant." *United States v. Brand, supra*, 556 F.2d at 1317 (n.7). Here, the *Lovasco* words, if indeed the government's 41-month delay in bringing the indictment were excusable, whatever the prejudice caused the defendant, simply by showing that the government was negligent, however grossly, and not bad-intentioned.

665 F.2d 582 ¶ 10 (footnote omitted). The majority correctly cites last year's Fifth Circuit opinion in *United States v. Byrd*, 31 F.3d 1329, 1339, as containing language requiring the defendant to prove intentional tactical delay by the Government. Curiously, the *Byrd* opinion makes no

that the latter view is the better one and most closely follows the balancing analysis employed by the Supreme Court in *Lovasco*.

In order for the court to weigh the competing interests correctly, it is necessary

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reference to *Townley* or *Brand* and contains no analysis of this question--rather, it makes the statement that is quoted by the majority.

In sole support of its assertion, *Byrd* cites (¶ 23) two of the 1994-vintage fifth circuit cases, *United States v. Neal*, 27 F.3d 1035 and *United States v. Beszborn*, 21 F.3d 62, 65-66. *Beszborn* cited only *United States v. Amuny*, 767 F.2d 1113 (5th Cir. 1985), while *Neal* cited *Amuny* as well as *United States v. Delario*, 912 F.2d 766, 769 (5th Cir. 1990).

Following the *Delario* line first,that case relied upon *United States v. Carlock*, 806 F.2d 535 (5th Cir. 1986), which in turn cited *United States v. Ballard*, 779 F.2d 287, 293 (5th Cir.), *cert. denied*, 475 U.S. 1109 (1986), which in turn cited *United States v. Amuny, supra*. In a footnote (18), the *Ballard* opinion offered a "*see also*" reference to *Townley*--which, it will be recalled, had analyzed and expressly had rejected this standard--and to *United States v. Hendricks*, 661 F.2d 68, 40 (5th Cir. 1980); more about *Hendricks* in a moment.

Now, in tracing the history of *Amuny*--the case solely relied upon by *Beszborn* (¶ 13) and cited along with *Delario* in *Neal*, the line is short. *Amuny*, after stating the test, cited *Townley*--but only for the prejudice element--and *Hendricks*--for the bad-motive element. ¶ 18) *Amuny* contains no hint why it would cite *Townley* for the prejudice element but entirely ignore the fact that that case had specifically rejected the bad-motive element as illogical; instead, for the bad-motive element of the test, *Amuny* relied only upon *Hendricks*. Not only did *Hendricks* predate *Townley* and therefore would seem to have overcome by it, but *Hendricks* itself simply stated that the defendant there had "produced no evidence even tending to show that the delay was a deliberate tactical maneuver by the government"--with no authority at all cited as support. ¶ 4.

In these circumstances, it would seem that any effort to discern the Fifth Circuit's position on this issue is problematic.

> for it to be fully apprised of the reasons asserted by the Government as necessitating the pre-indictment delay. These reasons can best be put forward by the Government. Accordingly, once the defendant has proven (1) actual prejudice (2) resulting from the delay, the burden shifts to the Government to show why the delay was necessary . . . .

25. Upon the logic reflected in the opinions quoted above, I believe that the more sensible approach and the one which is more sensitive to the nature of the due process inquiry is as follows: Once an accused has shown actual prejudice, the court will balance the nature of that prejudice against whatever reasons are offered by the Government to explain the delay. The court will ask itself, given the balance under the circumstances of the case before it, whether the Government's prosecution after substantial delay violates "fundamental conceptions of justice" or "the community's sense of fair play and decency." *See United States v. Lovasco, supra* at 790 ¶ 11.

26. Thus, unlike the majority, I would not place the burden on the *accused* to divine and demonstrate the *Government's* reasons for its delay in preferring charges;that does not seem to me to be common sense. Also apparently unlike the majority, I would not block myself as a matter of law from finding a denial of due process in any particular case just because the delay resulted from something like the Government's gross negligence or recklessness, as opposed to bad motive.

27. As to this latter point, it may be that the majority anticipates that such scenarios would constitute "egregious" delay and so could be remedied under its

standard. *See generally United States v. Vogan*, 35 MJ 32, 34 ¶ 8 (CMA 1992)(Due Process Clause of Fifth Amendment "may be applicable to protect an accused against egregious trial delays"). I would prefer, instead, simply to follow the approach of looking at whatever reasons the Government offers in the course of considering whether continued prosecution in a particular case violates due process as described in *Lovasco*, rather than using uncertain labels like "egregious." I am convinced that this approach best reflects *Lovasco*'s balancing analysis that is designed to permit a court to make a "delicate judgment" in each individual case that will "accommodate the sound administration of justice to the rights of the defendant to a fair trial." *United States v. Marion, supra* at 325 ¶ 16.

28. From the military judge's written ruling, which is attached as an appendix to the Chief Judge's separate opinion, the military judge seems to have performed the balancing test that I would adopt. He wrote: "These cases require a court to evaluate a claimed violation of the Fifth Amendment Due Process Clause by looking to any actual prejudice to the accused and considering the reasons for delay." Accordingly, I would find in favor of the military judge on this first question.

29. The majority, however, embraces the more difficult intentional-delay test. Under these circumstances, it would seem appropriate for the majority to remand the case to the military judge for reconsideration of appellant's motion based upon what the majority now holds is the correct legal standard. Without explanation, though, the majority itself proceeds to apply this test for the first time to the evidence in this case. In my opinion, that usurps the military judge's function and the right of appellant to have his motion decided upon correct legal principles in the trial

forum.

II

30. As indicated earlier, the predicate to any need to evaluate the Government's reasons for delay is a showing by an accused of actual prejudice resulting from the delay. The elements of prejudice that are considered in civilian courts relate only to impact on the accused's ability to prepare and present a defense. *See United States v. Lovasco* and *United States v. Marion*, both *supra*. In this case, however, the military judge--as is clear from his written ruling--considered not only those factors but, as well, other aspects of "prejudice" which the military judge decided had peculiar impact on the personal and professional life of a military accused versus a civilian defendant.

31. Before this Court can review the correctness of the judge's dismissal ruling, it must necessarily decide whether those factors properly may be weighed in a Fifth Amendment due process analysis or, instead, whether they are limited to a Sixth Amendment speedy-trial analysis (not in issue here) because they have nothing to do with the accused's ability to present a defense. I have a sense from the majority's opinion that it views the appropriate scope of the search for prejudice in a Fifth Amendment context to be limited to factors affecting an accused's ability to prepare and present a defense. On the basis of the concerns ventilated in *Lovasco* and consistent with the manner in which other Federal courts have applied *Lovasco*, I agree.

32. That being the case, again I suggest that the appropriate remedy is a remand to the trial court so that

the military judge can evaluate appellant's motion under a proper understanding of the legal parameters of his consideration.[2] A trial forum is the appropriate place for a motion to be considered and decided under correct legal principles, and the ruling there would seem to be reviewable only for an abuse of discretion. *See United States v. Fuzer*, 18 F.3d 517, 519 ¶ 9 (7th Cir. 1994). That is a highly deferential standard, and conceptually it would not seem to square with the majority's assumption of the function of not only deciding the proper legal principles but also being the first forum to apply them in a particular case.

III

33. In summary, then, I would hold that the military judge applied the correct legal test to resolve appellant's due process claim but, in considering prejudice to appellant, erred in defining the scope of factors to be considered. On this basis, I would remand the case to the military judge for reconsideration in light of this holding.

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[2] I agree with the Chief Judge that the military judge's findings "do provide some evidence of legally cognizable prejudice...." ___ MJ at (1) ¶ 18. How that prejudice balances against the Government's reasons for delay, of course, is a matter for the military judge to consider on remand. Regrettably, the majority is unwilling to give the military judge that opportunity.

APPENDIX B

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

UNITED STATES, Appellant	NMCM No. 9400213
v.	GENERAL COURT-MARTIAL
Kayno M. REED 420-17-3028 Seaman (E-3) U.S. Naval Reserve, Appellee	OPINION OF THE UNITED STATES NAVY-MARINE CORPS COURT OF MILITARY REVIEW ON APPEAL BY THE UNITED STATES

Decided 19 April 1994

LCDR LYLE H. BOWEN, Jr., JAGC, USN, Appellate Government Counsel
CDR PHILIP D. CAVE, JAGC, USN, Appellate Defense Counsel
LT BRIAN C. LANSING, JAGC, USNR, Appellate Defense Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WELCH, Senior Judge:

This is a Government appeal pursuant to Article 62, Uniform Code of Military Justice [hereinafter UCMJ], 10 U.S.C. § 862.

The Government contends that the military judge erred as a matter of law when he dismissed the charges alleging rape based on his opinion that the accused had been denied due process under the Fifth Amendment to the United States Constitution (i.e., by the Government's delay prior to preferral of charges).

We agree with the Government's position and hold that the military judge erred as a matter of law when he dismissed the charges.

I. Statement of Facts[1]

The charge and specifications stem from a November 1991 weekend party in a civilian hotel, which was attended by a group of sailors, including the accused. The sailors were undergoing apprenticeship training at the Naval Training Center in Orlando. Seaman D alleges that the accused raped her twice in a hotel room after she had passed out on a bed from her over-indulgence of alcoholic beverages. Seaman D did not immediately report the alleged rapes to anyone in authority. Her report was made only after she had informed her husband, an active duty service member, about the alleged rapes. Her husband reported it to the chaplain at his command, who then told Seaman D's command. On 13 Mar 92, Seaman D was referred by her command to the Naval Criminal Investigative Service [hereinafter NCIS] in San Diego to make a report of the incident. Inv. Off. Ex. 12 and 16.

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[1] The parties agree concerning the basic facts stated in this section of the opinion. We have electronically lifted the factual summary from the excellent briefs of appellate counsel.

The chronology of events concerning the NCIS investigation of the alleged rapes is as follows:

13 Mar 92: Upon taking a sworn statement from Seaman D, NCIS initiated an investigation into her allegations of rape. App. Exs. I-II and IV; Inv. Off. Ex. 12. NCIS Special Agent [hereinafter S/A] Robin Flanders in San Diego was assigned as the control agent for the case. App. Ex. II. At that time, Seaman D could only identify her alleged attacker as a black male with the last name of "Reed," who had been in a Navy school in Orlando at the time of the incident. *Id.* NCIS also requested from NTC, Orlando rosters of those sailors who had been attending apprenticeship training with Seaman D in November 1991. App. Exs. II and IV.

31 Mar 92: Those rosters were received by S/A Flanders. *Id.*

27 Apr 92: Seaman D identified the name "Kayno Reed" as her attacker and she also provided the names of additional witnesses. *Id.* NCIS sent leads to conduct interviews of the following personnel: Seaman Apprentice Chakrabarty, assigned to USS CAMDEN, in Bremerton, Washington; Seaman Apprentice

Bechtol, assigned to USS DEYO, in Charleston, South Carolina; Seaman Recruit Stewart, assigned to USS ROANOKE, in Long Beach, California; Seaman Apprentice Fisher, assigned in the Norfolk area; and Fireman Apprentice McElroy, assigned to USS FLETCHER, in Pearl Harbor, Hawaii. App. Exs. II and IV; Inv. Off. Exs. 9-10 and 13-15. A lead was also sent to Mayport, Florida to obtain a photograph of and fingerprints from the accused. App. Exs. II and IV.

4 May 92: Stewart was interviewed by NCIS S/A Beddo Los Angeles, California. Inv. Off. Ex. 13. Stewart confirmed that Seaman D had been at the party, but had no knowledge of any rape occurring. *Id.*

5 May 92: NCIS investigators in Norfolk forwarded a lead to New York, where USS BEARY was then located, in an attempt to interview Fisher, a crew member. App. Exs. II and IV.

11 May 92: Bechtol was interviewed by S/A Marks in Charleston, South Carolina. Inv. Off. 14. On 13 May 1992, S/A

Flanders received information that McElroy was deployed on his ship in the Western Pacific and was not due to return until late July 1992. App. Exs. II and IV. She then coordinated with the NCIS special agent with the battle group for an interview of McElroy. App. Ex. IV.

14 May 92: The results of the Stewart interview were received by NCIS in San Diego. App. Exs. II and IV.

15 May 92: S/A Flanders received a report from Mayport that appellant was deployed on his ship USS JOHN L. HALL. A lead was forwarded to the NCIS special agent on board USS SARATOGA. NCIS investigators in Bremerton forwarded a lead to Seattle, where CAMDEN had moved, for the interview of Chakrabarty. *Id.*

21 May 92: S/A Flanders received the results of the interview of Bechtol from NCIS agents in Charleston, South Carolina. *Id.*

26 May 92: NCIS agents in Honolulu forwarded a lead regarding McElroy to Singapore. App. Ex. II. S/A Flanders received lead from NCIS agent on USS SARATOGA informing her that the accused's ship, USS JOHN L. HALL, had departed

from the battle group and was inaccessible. App. Exs. II and IV. S/A Flanders then forwarded lead to Souda Bay, Crete regarding the accused. *Id.*

4 Jun 92: Chakrabarty was interviewed in Seattle, Washington by NCIS S/A Campbell. Inv. Off. 9. Chakrabarty corroborated many of the events related by Seaman D and related that he had observed a black male named "Reed" making sexual advances towards her while she was passed out in the hotel room. *Id.*

8 Jun 92: S/A Flanders received information from Singapore that McElroy's ship had departed Singapore prior to receipt of lead sent. App. Exs. II and IV. She then forwarded new lead to Yokosuka, Japan, regarding McElroy. *Id.*

16 Jun 92: S/A Flanders received Chakrabarty's sworn statement. *Id.*

23 Jun 92: A lead regarding the accused was forwarded from Souda Bay, Crete, to Naples, Italy. *Id.*

6 Jul 92: S/A Flanders was informed from New York that Fisher was no longer on board BEARY and no longer in the Navy. *Id.*

8 Jul 92: She then sent lead to Houston to have agents there contact Fisher at her separation address for an interview. That same day, NCIS agents in Naples informed S/A Flanders that they would monitor port for the arrival of the accused's ship. *Id.*

14 Jul 92: NCIS agents in Houston received lead on Fisher and indicated that a 2-week turnaround was likely. *Id.*

15 Jul 92: S/A Flanders received information from Yokosuka that *McElroy had been an unauthorized absentee from February 1992 to June 1992. Id.* She then sent lead back to Honolulu where McElroy was awaiting separation. *Id.*

21 Jul 92: McElroy was interviewed by NCIS S/A Torco at Pearl Harbor, Hawaii. Inv. Off. Ex. 10. McElroy, in relating events which transpired the night of the party, confirmed that "Reed" had been at the party and, in taking an interest in Seaman D, had

made sexual comments about her. *Id.* McElroy also stated that, in the morning after the party, Seaman D had told him that "Reed" had raped her during the night. *Id.*

22 Jul 92: S/A Flanders received McElroy's sworn statement. App. Exs. II and IV.

28 Jul 92: Fisher was interviewed by NCIS S/A Richardson in Houston, Texas. Inv. Off. Ex. 15.

10 Aug 92: S/A Flanders received the results of Fisher's interview. App. Exs. II and IV.

24 Aug 92: S/A Flanders received the photographs and fingerprints of the accused. *Id.*

28 Oct 92: Seaman D, who had just returned from deployment, identified the accused as her attacker from a photographic line-up. *Id.*; Inv. Off. 11.

30 Oct 92: S/A Flanders forwarded a lead to NCIS agents in Mayport, Florida requesting the accused be interrogated. App. Exs. II and IV.

19 Nov 92: The accused was advised of his rights and invoked his right to remain

silent.

1 Dec 92:	S/A Flanders received the results of the attempted interrogation of the accused. App. Exs. II and IV.
8 Dec 92:	The investigation into the alleged rape of Seaman D by the accused was closed by NCIS in San Diego. *Id.*

Soon after the NCIS investigation had been closed, the accused's command, USS JOHN L. HALL, which was then located at Naval Station, Pascagoula, Mississippi, received a copy of it. Record at 18. Following receipt of the investigation, in consultation with Lieutenant Reismeier, Naval Legal Service Office, Mayport, Florida, a follow-up investigation was requested on 13 January 1993. Inv. Off. Ex. 16; Record at 18-19. The purpose of this request was for NCIS to re-interview McElroy to inquire if he could identify any other individuals who may have been in the hotel room that evening. *Id.* McElroy was contacted telephonically on 6 May 1993. Inv. Off. Ex. 16. However, he was unable to provide any additional information. *Id.* A report of this action, dated 7 May 1993, which completed the active NCIS investigation was then forwarded to the accused's command. *Id.*; Record at 19.

On 4 September 1993, the accused was informed that he was being involuntarily extended on active duty because he was under investigation for rape. App. Ex. VII. In September 1993, the accused requested permission to take the E-4 advancement exam. Record at 32. That

request was denied due to the accused's poor performance record. Record at 34. On 24 September 1993, the charge and specifications were preferred against the accused. Charge Sheet. The accused was informed of the charges on 27 September 1993. *Id.* The charges were received by the accused's command, the summary court-martial convening authority, on 5 October 1993.

On 8 October 1993, an investigation pursuant to Article 32, UCMJ, was conducted into the charges. The investigating officer, whose report is dated 21 October 1993, recommended trial by general court-martial on the charge and specifications against the accused. Inv. Off. Report. On 23 November 1993, the accused's command forwarded the case to the general court-martial convening authority, the Chief of Naval Education and Training, concurring in the recommendation of the investigating officer. USS JOHN L. HALL ltr 5810 Ser FFG 32-LEGAL/93166 of 23 Nov 93. On 7 January 1993, the Staff Judge Advocate, Chief of Naval Education and Training in an Article 34, UCMJ, advice letter also recommended that the charges and specifications against the accused be referred to a general court-martial. SJA, CNET ltr 5811 Ser 00J of 7 Jan 93. On 10 January 1993, the charge and specifications were referred to trial by general court-martial by the Chief of Naval Education and Training. Charge Sheet.

Additionally, the accused requests that we consider the following additional facts and chronology:

Julian Date	Elapsed Days	Date	Event
	--/--	14 Jul 93	Message from NLSO to HALL. App. Ex. VI.
247	00/--	04 Sep 93	Expiration of Active Obligated Service (EAOS). Charge Sheet; App. Ex. VII.
	02/--	06 Sep 93	Date after which trial counsel suggested trial to be scheduled. App. Ex. VI.
267	20/00	24 Sep 93	Preferral of charges.
270	23/03	27 Sep 93	Receipt of sworn charges. Charge Sheet.
279	32/12	06 Oct 93	TDC requested delay of Art. 32 hearing. App. Ex. V.
280	33/13	07 Oct 93	TC endorsement. App. Ex. V.
280	33/13	07 Oct 93	IO denial of delay App. Ex. V.
010	128/108	10 Jan 94	Referral of charges.
011	129/109	11 Jan 94	Accused served charges.
021	139/119	21 Jan 94	Arraignment.
021	139/119	21 Jan 94	Motion to dismiss. Record at 6.
027	145/125	27 Jan 94	Charge dismissed. Record at 48.

1. The accused was on notice since August 1992 that rape allegations were being made against him. Record at 32-33; App. Ex. V at 2, ¶ 3.

2. The accused requested that the Article 32, UCMJ hearing be delayed from 8 to 25 October 1993. App. Ex. V.

3. The accused did not formally demand a speedy trial. However, the accused was not detailed a defense counsel until 1 October 1994, months after the investigation was complete, and several weeks after he was involuntarily extended and charges preferred. App. Ex. V.

II. The Military Judge's Ruling on Motion to Dismiss

We have attached the military judge's ruling on the accused's motion to dismiss the charges as Appendix A of this decision.

III. The Applicable Law

In ruling on Government appeals under Article 62, UCMJ, we may act only with respect to matters of law. Additionally, we are bound by the military judge's factual determinations unless they are "unsupported by the evidence of record or clearly erroneous." *United States v. Bolado*, 34 M.J. 732, 735 (N.M.C.M.R. 1991) (citing *United States v. Burris*, 21 M.J. 140, 143-145 (C.M.A. 1985) and *United States v. Middleton*, 10 M.J. 123, 133 (C.M.A. 1981)).

In *United States v. Lovasco*, 431 U.S. 783 (1977), the Supreme Court, elaborating on the meaning of *United States v. Marion*, 404 U.S. 307 (1971), stated principles of

law to be followed when determining whether the Due Process Clause of the United States Constitution requires dismissal of an indictment because of delay between the alleged commission of an offense and the initiation of prosecution.

In *Lovasco*, the accused was charged with possessing firearms stolen from the mail and dealing in firearms without a license contrary to Federal law. He was indicted approximately 18 months after commission of the alleged offenses. An investigative report was prepared about a month after commission of the alleged offenses, but little additional information was developed in the following 17 months. To establish prejudice to the defense, the accused testified that he had lost the testimony of two material witnesses due to the delay. The first witness died more than a year after the alleged crimes occurred. According to the accused's testimony, the first witness, Tom Stewart, had been his source for two or three of the guns. The second witness, the accused's brother, died eight months after the alleged commission of the crimes. According to the accused, his brother was present when the accused called Tom Steward to secure the guns. Additionally, the accused testified that his brother witnessed the sales of these guns. The accused did *not* testify how the witnesses would have aided the defense had they been willing to testify. The District Court dismissed the charges based on its finding that the delay was unjustified, unnecessary, and unreasonable. The Court of Appeals affirmed the dismissal of three counts, but the Supreme Court reversed that decision. Interestingly, the Court of Appeals reversed the dismissal of a fourth count of the indictment, charging the accused with dealing in firearms without a license, because the accused *"had not alleged that the missing witnesses could have provided*

exculpatory evidence on this case." 431 U.S. at 788, n.6 (emphasis added).

We find the following relevant guidance in *Lovasco*:

a. Statutes of limitations provide the primary guarantee against bringing overly stale criminal charges. But they do not fully define an accused's rights with respect to events occurring prior to indictment. The Due Process Clause has a limited role to play in protecting against oppressive delay. 431 U.S. at 789 (citing *Marion*, 404 U.S. at 322-324).

b. Proof of actual prejudice makes a due process claim concrete and ripe for adjudication, but it does not make the claim automatically valid. Thus, "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." 431 U.S. at 790 (citing *Marion*, 404 U.S. at 326).

c. The Due Process Clause does not permit a judge to abort a prosecution simply because the judge disagrees with a prosecutor's judgment as to when to seek an indictment. A judge is to determine only whether the action complained of (i.e., compelling an accused to stand trial after the Government delayed indictment) "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' (citation omitted), and which define 'the community's sense of fair play and decency,' (citation omitted)." 431 U.S. at 790.

d. Investigative delay is fundamentally unlike delay solely to gain tactical advantage over the accused because

investigative delay is not one-sided. Thus, a prosecutor abides by elementary standards of fair play and decency when he refuses to seek an indictment until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. "Penalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed,' (citation omitted)." 431 U.S. at 795.

e. "[T]o prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time." 431 U.S. at 796.

In *United States v. Reeves*, 34 M.J. 1261 (N.M.C.M.R. 1992), this Court stated:

> The form of prejudice with which the Court was concerned in *Marion* and *Lovasco* was the accused's ability to present a defense without being substantially hampered by a lapse of time. In other words did the passage of time cause evidence to be lost, memories of witness [sic] to be impaired, or loss of witnesses altogether.

Id. at 1263. The only proof of possible prejudice in *Reeves* indicated that the accused was not able to attend job interviews and return home to resume his life because new charges were preferred just prior to the expiration of his sentence to confinement adjudged at a prior court-martial. However, that type of prejudice had nothing to do with the accused's ability to present a defense to the charges against him. As the Court noted,

> [t]o the contrary, the evidence indicates that all of the witnesses were available to testify at trial. There was no evidence alleged to have been lost and no indication that witnesses' memories were affected. The only theory advanced by appellee at trial along these lines was that the delay prevented the defense from investigating the state of mind of the witnesses at a time near the time the offense was alleged to have occurred. There was no evidence offered as to how this hampered the defense, if at all, and we reject this theory as proof of actual prejudice in this case.

Id. at 1263; *see also United States v. Vogan*, 35 M.J. 32 (C.M.A. 1992) (no denial of due process based on approximately 1-year delay in preferral of charges because no evidence presented to show an egregious pretrial delay or that accused was unable to mount an effective defense due to the delay); *United States v. Devine*, 36 M.J. 673, 677 (N.M.C.M.R. 1992), *petition granted* 38 M.J. 186 (C.M.A. 1993) (no denial of due process when delay in preferral of charges was in excess of 1 year from the date the Government received statements from the alleged accomplices).

IV. Our Conclusions

Our holding that the military judge erred as a matter of law when he dismissed the charges is based on the following reasoning.

A. The finding that the accused suffered actual prejudice by the delay between notice of the alleged crime and the preferral of charges is not supported by the evidence.

We find that the reasons given by the military judge on the record and in Appellate Exhibit VIII for his finding of actual prejudice are supported by little more than speculation (i.e., the record does not support his finding).

First, the military judge stated that the mere length of delay created an inference that memories will fade. The only evidence supporting this inference is a report of a telephonic conversation conducted by NCIS with Fireman Apprentice McElroy in which he stated on 6 May 1993 that he did not believe, because of the lapse of time, that he would be able to identify the person who came into the hotel room with the accused on the night of the alleged rape. Conspicuously absent from the record is any indication from the defense affirmatively asserting either (a) that the accused does not know the identity of this man with whom he spent some time, or (b) that the man will provide information helpful to the accused's defense. This failure to present some evidence or proffer regarding the knowledge of the accused concerning the identity of this man, coupled with the failure to present anything to indicate how this information would contribute to the defense of the accused, calls into question the sincerity of the accused's claims and the validity of the military judge's findings. The record presented is reminiscent of the statement in *Lovasco*, 431 U.S. at 788, n.6, noting that the Court of Appeals unanimously reversed the dismissal by the trial judge of one count of the indictment because the respondent had not alleged that the missing witnesses

could have provided exculpatory evidence. On the other hand, the record demonstrates that the NCIS investigator unearthed considerable evidence that might assist the accused in preparing his defense (e.g., sworn statements and rosters of personnel at NTC, Orlando). Stated otherwise, we view the telephonic comments attributed to Fireman Apprentice McElroy as not being an impediment to a fair trial and the military judge's reference to the inference raised by the passage of time as no more than a shibboleth.

Second, the military judge attached undue significance to the fact that the defense counsel would not have the opportunity to question witnesses as early as the Government, and that the witnesses would refresh their memories from statements prepared by the Government. Nothing was offered by the defense to support this premise. Indeed, the record indicates that the Government did not have the opportunity to interview the witnesses until months after the alleged incident. Thus, the military judge did no more than state a conclusion applicable to many trials. There is simply nothing about this sequence of events that offends our sense of fair play and justice. In our opinion, the military judge's expressed concerns relating to the dates when statements were taken can be assuaged by affording the accused the traditional opportunity to thoroughly cross-examine the witnesses at trial.

Third, the military judge noted that the defense alleged that the delay had resulted in an inability to identify and locate two black males who may have been present in the hotel room when the alleged rape occurred. The military judge's finding referred only to an allegation of the defense; there was no evidence offered to prove the

allegation. On the other hand, the record discloses that the NCIS made considerable efforts to locate the people who were in the room on the night of the alleged rapes. More significantly, there is no evidence in the record to demonstrating how earlier preferral of charges would have given the defense any greater opportunity to find the alleged witnesses whose identity could not be established earlier by the NCIS. Additionally, there is not the slightest indication in the record of how the individuals would provide exculpatory evidence.

Fourth, the military judge devoted one paragraph of his findings to stating the prejudice the accused suffered by being held on active duty beyond his EAOS date. As we said in *Reeves*, the type of prejudice that the military judge was referring to has nothing to do with the accused's ability to present a defense to the charges against him. 34 M.J. at 1263. Additionally, the military judge, in the instant case, appears to have ignored the evidence indicating that the accused was denied the opportunity to take an advancement exam solely because of his poor performance. Record at 34.

Fifth, the military judge wrote over 30 lines supporting his opinion that a strong prejudice attaches to an accused in the military who works for an "employer-boss" who is in effect the "district attorney." There is nothing in the record to support the military judge's opinions. More importantly, the comments indicate (a) a misunderstanding of the role of a commanding officer in the military justice system, and (b) that the military judge gave considerable weight to a concern not relevant to the due process considerations addressed in *Lovasco*.

Based on this record, we find that the military judge's finding that the accused suffered actual prejudice by the delay in preferral of charges is both unsupported by the evidence and clearly erroneous.

B. The evidence does not support the finding that the delay from notice of offense until preferral of charges was without justification.

The military judge's summary of the basis for his dismissal of charges concluded that this case "concerns an incident which was quickly narrowed to one suspect, one victim and a handful of witnesses." This conclusion understates the magnitude of the efforts expended by NCIS and the accused's command to assure that the accused was not brought to trial before a thorough investigation was completed. The initial report of rape was made approximately 2 months after it allegedly occurred. The potential witnesses were, literally, spread around the world. At times, some were deployed at sea, separated from the military, or in a status of unauthorized absence. After the NCIS investigation was closed, it was re-opened only after legal advice was obtained by the accused's command. It was re-opened not for a tactical advantage, but for investigative purposes (i.e., to attempt to locate more potential witnesses). The investigative delay might have benefitted either the accused or the Government. It was precisely the type of delay found to be appropriate in *Lovasco*, 431 U.S. at 795. Thus, we conclude that the military judge's finding that such delay was without justification is both unsupported by the evidence and clearly erroneous.

C. The military judge did not properly follow the law stated in Lovasco.

In determining that the military judge did not properly follow the law stated in *Lovasco*, we have evaluated the three factors deemed significant by that opinion.

First, we have examined the reason for the delay. Based on the record, we readily conclude that the delay in preferring charges was based primarily on investigative delay as opposed to delay undertaken to gain a tactical advantage over the accused. No doubt, the delay was longer than that normally desired. Nevertheless, it was delay attributed to a purpose deemed acceptable by the United States Supreme Court.

Second, we have examined the record for proof of prejudice to the accused caused by the delay in preferral of charges. The record is devoid of evidence proving that the defense has been hurt by the delay in any legally significant manner. The accused's case in support of an allegation of prejudice is extremely weak and lacks indicia of a case of true prejudice. At best, it indicates that the accused "*might* have been somewhat prejudiced by the lapse of time." *Lovasco*, 431 U.S. at 796 (emphasis added). That is not an adequate basis for dismissal of charges.

Third, we have evaluated the record to determine whether prosecuting the accused after the delay documented in the record would violate fundamental concepts of justice which lie at the base of our civil and political institutions and which define our community's sense of fair play and decency -- the bottom line in *Lovasco*. Considering the existence of evidence supporting referral of the charges, the world-wide dispersion of potential witnesses, and the absence of any significant proof of prejudice to the accused attributed to the delay,

we find that principles of *Lovasco* were not violated by the preferral of charges against the accused on 24 September 1993.

In summary, we find that the military judge's dismissal of charges was based on a misapplication of the law stated in *Lovasco*. He erred as a matter of law. When a due process violation is alleged based on a delay in prosecution, a judge must evaluate both the reasons for the delay and the prejudice to the accused, and remember that mere prejudice attributable to the delay is not an adequate basis for dismissing charges. More is required. To constitute a due process violation, the delay must violate fundamental concepts of justice and offend the community's sense of fair play and decency. In our opinion, the military judge in this case based his decision on mere allegations of prejudice. More precisely, his conclusions were not based on evidence proving that the accused was deprived of his ability to defend against the charges by the passage of time and that, under the circumstances, prosecution would offend the fundamental concepts of justice and the community's sense of fair play and decency.

Accordingly, the appeal of the Government is granted. The ruling of the military judge dismissing the charges is reversed. The record will be returned to the military judge for action not inconsistent with this opinion.

EDWIN W. WELCH

Chief Judge LARSON and Judge McLAUGHLIN concur.

DAVID C. LARSON

P.J. McLAUGHLIN

APPENDIX C

NAVY-MARINE CORPS TRIAL JUDICIARY
SOUTHEAST JUDICIAL CIRCUIT (PENSACOLA)
UNITED STATES NAVY

UNITED STATES

V.

KAYNO M. REED
420-17-3028
SN, USNR

GENERAL COURT-MARTIAL
RULING ON DEFENSE
MOTION TO DISMISS

OPINION OF THE COURT: Although the Defense has raised several issues of merit in its Motion to Dismiss, for reasons to become apparent, this opinion will address only the allegation that the accused was denied his Fifth Amendment right to Due Process. The Due Process guarantee of the Fifth Amendment applies to pre-preferral delays in prosecuting the accused. Once preferral has occurred, other speedy trial guarantees apply.

The leading case on the Fifth Amendment Due Process Clause is *United States v. Lovasco*, 431 U.S. 783 (1977). In this case the Supreme Court held that for a delay to be in violation of the Fifth Amendment Due Process Clause it must violate those "fundamental conceptions of justice which lie at the base of our civil and political institutions" and which define the "community sense of fair play and decency" *Lovasco* at 790. Military cases on this issue include *United States v. Vogan*, 35 MJ 32 (CMA 1992), *United States v. Reeves*, 34 MJ 1261 (NMCMR 1992). These cases require a court to evaluate a claimed violation of the Fifth Amendment Due Process Clause by looking to any actual prejudice to the accused and considering the reasons for delay.

Actual prejudice to the accused in this case includes the following:

An approximate 20 month delay occurred from the time of notice of the crime until preferral of charges. A delay of this magnitude clearly creates the inference that memories will have faded. This inference is easily supported by the NCIS investigation which reported that because of the delay a witness to the incident was unable to recall and identify others who were present when this event allegedly occurred. This delay will further have, at a minimum, denied the defense the opportunity to question the witnesses, as did the Government, at a time when their memory would be fresh. Rather, as the Government indicated in their Response to this motion, the witnesses will now likely refresh their recollection with the statements taken by the Government through NCIS.

The Defense specifically alleges the delay resulted in an inability to identify and locate certain witnesses generally identified as "two black males" in the room the night of this alleged incident. This contention is supported by the NCIS investigation which discusses a similar inability.

The accused has been held over his EAOS which would have been 4 September 1993. He was not free to return to civilian life at the expiration of his two year active duty enlistment. This prejudice is one not easily measured under a civilian "community sense of fair play and decency," as required by *Lovasco*. In a civilian community the accused is not restrained by the investigating jurisdiction unless he is in some fashion confined or his freedom of movement restricted--a stage at which other speedy trial rules would apply. In the military

community a simple administrative action ensures retention of jurisdiction and the concomitant restriction of his freedom to re-enter the civilian community.

There is further a strong prejudice which attaches to an accused in the military, as this accused, whose command knows he is a "suspect" and then becomes the convening authority responsible for criminal processing of the alleged offense. In this regard, the military environment is unique and different than the civilian community and requires an application of a "community sense of fair play and decency" which may be different than which applies in a civilian community. In the case at bar, we are concerned with a military community where, to analogize to the civilian community, the accused's "employer-boss" is in effect the "district attorney" who is determining whether to proceed with charges. This is markedly different than in the civilian community where an individual may be a suspect but, other than the investigators and possibly the district attorney, his personal/professional life will be by-and-large unaffected by these potential charges. For this accused, he was required to rely on his commanding officer, the "district attorney", for performance evaluations, recommendations for advancement, opportunities for school and training and other areas where he would have to compete with shipmates for consideration. The prejudice to someone in this predicament is subtle but obvious. It appears the accused's commanding officer clearly became aware the accused was a suspect in August 1992 when a NCIS agent came aboard the ship in Malta to photograph the accused for line-up. For over 11 months prior to preferral, the accused's commanding officer was not only aware that he was a suspect but actually had a complete copy of the investigation and was responding to the alleged victim's

command concerning action he was taking. At one point in December 1992, he even ordered further investigation by NCIS.

The Government's justification for the delay includes the following:

A lengthy chronology of investigative efforts to locate witnesses and interview them around the world. Since this incident allegedly occurred at "A" school but was not reported until after the school had been completed, the students had been sent to their next assignment and it was no easy task to locate them. This process, however, became ever more bogged-down as the investigative delays themselves caused further difficulties in locating suspects. It appears, as an example, that NCIS waited ten months to interrogate the accused. To illustrate further delay, at one point after the investigation had been closed, it was re-opened at the request of the commanding officer. It took NCIS over seven months of investigation for the limited purpose of obtaining additional information which was essentially that the witness could not remember anything further. In an effort to both explain the delay and minimize its prejudice, the Government is forced to take inconsistent positions. They argue, on one hand, that the investigation required significant time because of the many witnesses and difficulty in perfecting their case, yet they argue that the accused is not prejudiced by this delay since the case is relatively straight-forward and the only significant witness is the victim. The Government cannot have it both ways.

In summary, it is not the purpose of this Court to point a finger or lay blame at Government officials for delays in this case. The court is aware that there are

investigative techniques to employ; resources are at times strained; and, the Government is entitled to perfect its case prior to preferral of charges. Additionally, commanding officers have ships to command and deployments to make. The inescapable conclusion in this case, however, is that the delay from notice of offense until preferral of charges was without justification and occurred to the great prejudice of the accused. This case concerns an incident which was quickly narrowed to one suspect, one victim and a handful of witnesses. there was no physical evidence to examine, no records to search and no lab or forensic tests to conduct. Indeed, the Government indicates at trial they intend to call only the alleged victim and two witnesses. The Government took approximately 20 months to investigate this incident and is now ready to prosecute using three witnesses. Nothing in the Government's argument serves as an adequate explanation of this delay. This delay was not without prejudice to the accused as he served over two-thirds of his enlistment as a rape "suspect" and known to be such by his commanding officer. The accused is further prejudiced by his involuntary extension beyond his enlistment and the many complications created by an effort to prepare a defense several years after the alleged incident.

Furthermore, while the statute of limitations may provide the outermost time at which an accused may be brought to trial, as the Government correctly argues, it clearly does not establish an entitlement for delay. Each case must be evaluated on its own merits, both the reasons for delay and the prejudices suffered by the accused. A relatively uncomplicated offense should not require an accused to suffer the prejudices as discussed above including those attendant to being labeled a "suspect" in a rape for over a year while at the same time the

Government's action is highlighted by month after month of complete inactivity. This Court finds that the accused has been denied the due process guaranteed him under the Fifth Amendment to the U.S. Constitution.

IT IS HEREBY ORDERED, Defense Motion to Dismiss is granted and the charge and specifications are dismissed with prejudice

T.P. Tielens
Military Judge

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No. 94-2048

Supreme Court, U.S.
FILED
AUG 28 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

KAYNO M. REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED SERVICES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's rights under the Due Process Clause of the Fifth Amendment were violated by the fact that the investigation that resulted in petitioner's court-martial for raping a female sailor lasted 20 months.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2048

KAYNO M. REED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED SERVICES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (Pet. App. 1a-10a) is reported at 41 M.J. 449. The opinion of the Navy-Marine Corps Court of Military Review[1] (Pet. App. 27a-49a) is unreported. The General Court-Martial ruling on the defense motion to dismiss (Pet. App. 50a-55a) is also unreported.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on March 22, 1995. The petition for a writ of certiorari was filed on June 14,

---

[1] Now the Navy-Marine Corps Court of Criminal Appeals.

1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner is charged, at a general court-martial, with raping a female student. The military judge granted petitioner's motion to dismiss, finding a pre-accusation delay in violation of the Due Process Clause of the Fifth Amendment. The Court of Military Review reversed, ordering the charges reinstated. The court of appeals affirmed. Pet. App. 2a.

1. In November 1991, a group of sailors, including petitioner, were undergoing apprenticeship training at the Naval Training Center (NTC) in Orlando, Florida. They attended a weekend party at a civilian hotel. At the party Seaman X was raped twice after she had passed out in a hotel room. Seaman X did not immediately report the crime to anyone in authority. Rather, in January 1992, she informed her husband of the incident after the couple watched a movie in which a woman was raped. Her husband, also on active duty in the Armed Forces, reported the offense to his command chaplain who, in turn, contacted the Naval Criminal Investigative Service (NCIS) in San Diego. Pet. App. 2a-3a.

On March 13, 1992, the NCIS requested information from naval authorities in Orlando relating to Seaman X's allegations. At that time, Seaman X could identify her attacker only as a black male named "Reed" who had been in a Navy school in Orlando at the time of the incident. Pet. App. 3a, 29a. The NCIS accordingly requested rosters from NTC of those students who had attended apprenticeship training during the same period as Seaman X. On March 31, 1992, NCIS received the rosters. On April 27, 1992, after review-

ing the rosters, Seaman X identified "Kayno Reed" (petitioner) as her attacker, and also informed NCIS of the names of five additional witnesses. NCIS thereupon sent inquiries to six locations, including one to Mayport, Florida, that requested petitioner's photograph and fingerprints. Shortly thereafter, NCIS learned that petitioner and one of the witnesses whom Seaman X had identified, Fireman Apprentice McElroy, had already deployed with their ships. Pet. App. 3a, 29a-30a.

NCIS San Diego then directed its field offices to interview the five witnesses identified by Seaman X. Those witnesses had undertaken different duty assignments around the United States; in addition, one had left the Navy, and another had been absent without authorization for almost five months. During the next three and one-half months, NCIS interviewed each of the five witnesses. NCIS San Diego received the last report of the five interviews on August 10, 1992. Pet. App. 3a, 30a-34a.

On August 24, 1992, NCIS received petitioner's photographs and fingerprints. On October 28, 1992, shortly after Seaman X had returned from a naval deployment, she participated in a photographic lineup arranged by NCIS, and identified petitioner as her attacker. Pet. App. 34a. Two days later, NCIS San Diego directed agents in Mayport, Florida, to attempt to interrogate petitioner. On November 19, 1992, NCIS agents in Mayport advised petitioner of his right to remain silent and requested an interview, but petitioner invoked his right to remain silent. On December 8, 1992, NCIS completed its investigation and forwarded a copy of its report to petitioner's commanding officer. Pet. App. 3a, 34a-35a.

On January 13, 1993, petitioner's commanding officer requested a follow-up interview of McElroy to determine if he could identify other individuals in the hotel room on the night of the alleged rape. On May 6, 1993, NCIS interviewed McElroy by telephone, but he was unable to provide additional information. Pet. App. 4a.

On September 4, 1993, petitioner was informed that he was being involuntarily extended on active duty, pending resolution of the investigation. On September 24, 1993, the rape charges and specifications were preferred against petitioner. On October 5, 1993, petitioner's commanding officer, a summary court-martial convening authority, received the charges. On October 8, 1993, an investigation under Article 32 of the Uniform Code of Military Justice, 10 U.S.C. 832, was conducted to determine if there were reasonable grounds to proceed to trial. On October 21, 1993, the Article 32 investigation was completed, and the investigating officer recommended trial by general court-martial. On November 23, 1993, petitioner's command forwarded the case to the general court-martial convening authority (GCMCA). On January 7, 1994, the GCMCA's staff judge advocate completed his review, concurring in the recommendation to refer charges to a general court-martial. On January 10, 1994, the charges were referred to a general court-martial. Pet. App. 4a, 35a-36a.

2. At trial, petitioner claimed that the delay in bringing the charges against him had denied him his right to due process under the Fifth Amendment. The military judge agreed and dismissed the charges. He noted that 20 months had passed between NCIS's having learned of Seaman X's allegations in January

1992 and its preferral of the charges in September 1993. That delay, the judge held, denied the defense the opportunity to question witnesses "at a time when their memory would be fresh," resulting in actual prejudice to petitioner. Pet. App. 50a-51a. The judge found that petitioner had suffered prejudice because, beginning in September 1993, he had been forbidden to return to civilian life. *Id.* at 51a-52a. While acknowledging the government's limited resources, its right to perfect its case before preferral of charges, and the need to accommodate the investigation to other naval interests, the judge found that the 20-month delay was unjustified, given that the investigation had "quickly narrowed to one suspect." *Id.* at 54a.

3. The Navy-Marine Corps Court of Military Review (the Navy Court of Review) reversed. Pet. App. 27a-49a. The military judge, it held, had misapplied *United States* v. *Marion*, 404 U.S. 307 (1971), and *United States* v. *Lovasco*, 431 U.S. 783 (1977), which require a defendant claiming pre-indictment delay to establish both actual prejudice resulting from the delay and intentional tactical delay by the government. The court found no actual prejudice. It noted that the military judge's concern about witnesses' fading memories had been based solely on witness McElroy's statement that he could no longer remember the identity of persons who had entered the hotel room with petitioner the night of the alleged rape. Reliance on that fact was misplaced, the court held, because petitioner had neither asserted that he was unaware of the identity of any such persons, or that any such person could provide information helpful to petitioner's defense. Pet. App. 43a-45a. Moreover,

like the defense, the government had been unable to interview witnesses until many months after the date of the alleged incident. Finally, the fact that petitioner had been held on active duty since charges had been preferred against him was irrelevant to the prejudice inquiry, because it did not relate to "the accused's ability to present a defense to the charges against him." *Id.* at 45a. The court also found the 20-month period between notice of the offense and preferral of charges justified, noting the magnitude of NCIS's efforts to conduct a thorough investigation and the fact that potential witnesses were "literally, spread around the world." *Id.* at 46a. Thus, the delay resulted from legitimate investigative reasons, and was not "undertaken to gain a tactical advantage over the accused." *Id.* at 47a.

4. The United States Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-10a. The "primary guarantee" against pre-accusation delay, it noted, is the statute of limitations governing the offense. *Id.* at 5a (quoting *Marion*, 404 U.S. at 322). Like the Navy Court of Review, the court held that a pre-accusation delay violates the Due Process Clause only when the delay produces actual prejudice, and when the prosecution has acted in "reckless disregard" of an "appreciable risk that delay would impair the ability to mount an effective defense." *Id.* at 6a (quoting *Lovasco*, 431 U.S. at 795 n.17). The court held that petitioner had shown neither egregious or intentional tactical delay, nor actual prejudice. The investigation had been delayed because it encountered difficulties "coordinating the location of witnesses throughout the world," the court noted, and the preju-

dice to petitioner was minimal and "did not involve lost witnesses or physical evidence." Pet. App. 8a.[2]

ARGUMENT

Petitioner claims (Pet. 8) that the court of appeals and the Navy Court of Review below utilized an incorrect standard to evaluate his claim of unconstitutional pre-accusation delay. Petitioner also claims (Pet. 6-9) that this Court should grant the petition for a writ of certiorari in order to resolve a split among the federal and state courts of appeals as to the correct standard to apply to such claims. While petitioner is correct that a circuit split exists on that question, this case is an unsuitable vehicle for resolving that conflict. Moreover, the standard applied by the court of appeals was correct in light of this Court's precedents.

1. As the court of appeals noted (Pet. App. 7a & n.1), most federal courts have held that a defendant claiming pre-indictment delay must establish both that the delay caused the defendant actual prejudice and that the delay was the product of intentional governmental attempt to gain a tactical advantage over the defense. See, *e.g.*, *United States* v. *Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994), cert. denied, 115 S. Ct. 1432 (1995); *Perez* v. *Sullivan*, 793 F.2d 249, 259 (10th Cir.), cert. denied, 479 U.S. 936 (1986); *United States*

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[2] Chief Judge Sullivan dissented, arguing that the majority and the court of military review had failed to review the military judge's ruling under an abuse-of-discretion standard. Pet. App. 9a (Sullivan, C.J., dissenting). He stated, without elaboration, that the record did supply "some evidence of legally cognizable prejudice and 'egregious or intentional' government conduct." *Id.* at 10a (Sullivan, C.J., dissenting).

v. *Amuny*, 767 F.2d 1113, 1119 (5th Cir. 1985); *United States* v. *Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1980); *United States* v. *Comosona*, 614 F.2d 695, 696 (10th Cir. 1980). As petitioner notes (Pet. 7), however, several courts of appeals have held that, upon a showing by the defense of actual prejudice, the burden shifts to the government to demonstrate legitimate reasons for the delay. Those courts have typically further held that the reasons for the delay must outweigh the prejudice to the defendant. See, *e.g.*, *Howell* v. *Barker*, 904 F.2d 889, 895 (4th Cir.), cert. denied, 498 U.S. 1016 (1990); *United States* v. *King*, 593 F.2d 269, 272 (7th Cir. 1979); *United States* v. *Valentine*, 783 F.2d 1413, 1416-1417 (9th Cir. 1986). See also *Hoo* v. *United States*, 484 U.S. 1035 (1988) (White, J., dissenting from the denial of certiorari) (noting circuit conflict).[3] Petitioner urges (Pet. 8-9) that the court of appeals erred in applying the former, not the latter, standard in this case, and that the government should have been required to establish legitimate reasons for waiting 20 months after Seaman X's allegations to charge petitioner with the rape.

This case is an ill-suited one in which to resolve the circuit conflict identified by petitioner, for two

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[3] In *United States* v. *Crouch*, 51 F.3d 480 (5th Cir. 1995), a panel concluded that Fifth Circuit precedents required the application of the balancing test described in text. Judge Garwood dissented from that holding, arguing that Fifth Circuit precedents actually required the defendant to establish both actual prejudice and intentional delay by the prosecutor to gain a tactical advantage. *Id.* at 485-486 (Garwood, J., dissenting). On June 14, 1995, the Fifth Circuit granted rehearing en banc to address the issue.

reasons. First, even if the legal standard endorsed by petitioner had been used in this case, petitioner would not prevail. That is because, as both the court of appeals and the Navy Court of Review held, petitioner has not demonstrated that he suffered actual prejudice from the 20-month delay in prosecution. And under the standard favored by petitioner, a showing of actual prejudice is a threshold requirement for an inquiry into the government's reasons for delay.

As the appellate courts below observed, the military judge's finding of actual prejudice was based essentially on speculation that the passage of time before charges were filed against petitioner would cause witnesses' memories to fade. See Pet. App. 8a (citing *id.* at 43a). As those courts noted, however, the sole example offered by the military judge was the possibility that the delay would make it impossible for the defense to identify witnesses who might have been in the hotel room at or around the time of the alleged rape. As the Navy Court of Review held, that possibility supplied an insufficient basis for a finding of actual prejudice, for several reasons. First, petitioner himself had never claimed that such witnesses possessed exculpatory evidence, and indeed had never claimed that he was unable to identify the persons present in the room. Pet. App. 44a-45a; *id.* at 45a ("there is not the slightest indication in the record of how the individuals would provide exculpatory evidence); see also *id.* at 8a n.2. Moreover, the NCIS investigators had themselves made extensive efforts to locate and interview the persons believed to have been in the room on the night of the alleged rape, and there was no basis for speculating that an earlier preferral of charges would have resulted in the iden-

tification of additional witnesses. *Id.* at 45a; compare *Lovasco*, 431 U.S. at 788 n.6 (noting lower court's rejection of pre-indictment delay claim where defendant did not assert that missing witness would provide exculpatory evidence).

The military judge also based his finding of actual prejudice on the fact that, based on NCIS's investigation, petitioner had been involuntarily extended on active duty beginning in September 1993. As the Navy Court of Review noted, however, that fact is irrelevant to the actual-prejudice inquiry, which instead focuses on whether pre-indictment delay has hindered the defendant's ability to present an effective defense at trial. See *Marion*, 404 U.S. at 325 (noting that "[n]o actual prejudice *to the conduct of the defense* [has been] alleged or proved") (emphasis added); cf. *Lovasco*, 431 U.S. at 788-790. As the Navy Court of Review put the point:

> The form of prejudice with which the Court was concerned in *Marion* and *Lovasco* was the accused's ability to present a defense without being substantially hampered by a lapse of time. In other words did the passage of time cause evidence to be lost, memories of witness[es] to be impaired, or loss of witnesses altogether.

Pet. App. 41a (brackets added) (quoting *United States* v. *Reeves*, 34 M.J. 1261, 1263 (N.-M.C.M.R. 1992)).[4]

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[4] Petitioner's claim would also fail under the standard he favors because, as the court of appeals held, the government did demonstrate legitimate reasons for delay: "the difficulties [of] coordinating the location of witnesses throughout the world." Pet. App. 8a. While the court of appeals did not explicitly balance the government's interest in investigative thoroughness

Apart from the fact that petitioner's claim of pre-indictment delay would fail under either of the standards utilized by the courts of appeals, this case is also unfit for review because petitioner's claim is premature. Petitioner has not yet been tried on the rape charges. If he is acquitted, his claim that pre-accusation delay actually prejudiced his ability to obtain a fair trial will be mooted. If he is convicted, petitioner will retain the right to challenge the pre-accusation delay, including, ultimately, by seeking review in this Court. A post-trial examination of petitioner's claim is preferable to the interlocutory review that petitioner seeks, because it would afford reviewing courts the opportunity to examine petitioner's claims of actual prejudice based on witnesses' memory loss in light of the actual proof adduced at trial.

2. While petitioner's claim of pre-indictment delay would fail under either of the standards used by the courts of appeals, the standard used in this case (requiring the defendant to prove both actual prejudice and an intentional delay to gain tactical advantage) is the more consonant with this Court's teachings. As this Court has observed, "the applicable statute of limitations * * * is * * * the primary guarantee against bringing overly stale criminal charges." *Marion*, 404 U.S. at 322 (quoting *United States* v. *Ewell*, 383 U.S. 116, 122 (1966)). The Due Process Clause therefore has only "a limited

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against the prejudice to petitioner worked by the delay, its finding that there was "minimal" prejudice (*ibid.*) implicitly recognizes that the government's reasons for delay in this case take precedence over petitioner's desire for a speedier preferral of charges.

role to play in protecting against oppressive delay." *Lovasco*, 431 U.S. at 789.

In defining that limited role, the Court has rejected the claim that prosecutors are under any duty to file indictments upon obtaining probable cause:

> It requires no extended argument to establish that prosecutors do not deviate from "fundamental conceptions of justice" when they defer seeking indictments until they have probable cause to believe an accused is guilty; indeed it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause. It should be equally obvious that prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. To impose such a duty "would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself." From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried.

Lovasco, 431 U.S. at 790-791 (citation and footnotes omitted). Requiring prosecutors to file charges upon assembling evidence sufficient to establish guilt would also "preclude the Government from giving full consideration to the desirability of not prosecuting in particular cases" where, for example, a participant is shown to have played a minor role in a crime or where

mitigating factors exist. *Id.* at 794. Accordingly, the Court has held:

> Rather than deviating from elementary standards of "fair play and decency," a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of "orderly expedition" to that of "mere speed." This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

Id. at 795-796 (citation omitted).

In light of these considerations, the standard for gauging claims of pre-indictment delay utilized by most courts of appeals, including the court below, is correct. That standard obliges the defendant to establish not simply the existence of prejudice, but also that the delay that caused that prejudice was brought about by illegitimate governmental motivations, such as the desire to put the defense at a tactical disadvantage, and was not based on the legitimate interest in conducting further investigation. See *United States* v. *Gouveia*, 467 U.S. 180, 192 (1984). By contrast, the standard endorsed by petitioner, which puts the burden of proof on the government following a mere showing of prejudice, is at odds with *Lovasco*'s teaching that, in cases involving pre-indictment delay, prejudice alone does not establish a due process violation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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